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No. 80-1246

In the Supreme Court of the United States

OCTOBER TERM, 1980

MAX FACTOR & CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

SANDRA K. WILLIAMS
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board abused its discretion in refusing to defer to an arbitral award on the ground that it was repugnant to the purposes of the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-5 to A17) is unofficially reported at 105 L.R.R.M. 2765. The decision and order of the National Labor Relations Board (Pet. App. A-1 to A4) are reported at 239 N.L.R.B. 804.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1980. A petition for rehearing was denied on October 24, 1980 (Pet. App. A-18). The petition for a writ of certiorari was filed on January 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. 173(d), is set forth at page 1 of the petition. Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a), provides in pertinent part:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

STATEMENT

1. Luisa Gratz was chief steward for the Warehouse, Processing and Distribution Workers Union, Local 26, International Longshoremen and Warehousemen's Union ("the Union") at petitioner's plant from 1974 to February 1977 (239 N.L.R.B. at 805). In the course of processing a large backlog of grievances, an unsatisfactory relationship developed between Gratz and petitioner's personnel manager, James Bryant. Gratz was twice given disciplinary warnings in December 1976 and was discharged in February 1977 (Pet. App. A-6). Gratz then filed unfair labor practice charges alleging that her discharge violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1). Shortly thereafter the Union grieved the discharge under the collective bargaining agreement and took it to arbitration. After a hearing, an administrative law judge found that petitioner had violated the Act and ordered reinstatement.[1] While this decision was pending before the Board, the arbitrator issued his decision (Pet. App. A-19 to A-45) finding that Gratz had been discharged for good cause (*id.* at A-5 to A-6).

The Board affirmed the findings and conclusions of the administrative law judge and adopted his recommended order (Pet. App. A-1 to A-4). Thus, the Board concluded

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[1]The decision of the administrative law judge was not included by petitioner in the appendix to the petition. It is appended to the official report of the Board's decision at 239 N.L.R.B. 805.

that petitioner violated Section 8(a)(3) and (1) of the Act by disciplining and discharging Gratz because of her union activities. 239 N.L.R.B. at 814-819. It further concluded that petitioner violated Section 8(a)(1) of the Act by offering Gratz economic benefits in exchange for her resignation as chief steward. 239 N.L.R.B. at 813-814.

These conclusions were based on specific factual findings made by the administrative law judge that petitioner had openly expressed its hostility to Gratz's diligent and aggressive manner of performing her duties as chief steward. 239 N.L.R.B. at 814. The administrative law judge also found that petitioner attempted to induce Gratz to give up her position as chief steward by explaining that her superiors in the Union did not like her and by offering her a better job or money to return to law school if she ceased serving as chief steward. *Id.* at 815. Finally, the administrative law judge found that petitioner had discriminated against Gratz by imposing more stringent conditions upon her activities as chief steward than were imposed upon other chief stewards. *Ibid.* Thus, he concluded that petitioner's explanation that Gratz had been discharged because she spent too much time on her steward responsibilities in dereliction of her production work was pretextual. *Id.* at 815-816. The administrative law judge also rejected petitioner's claim that Gratz had been lawfully disciplined and discharged for insubordination and use of profane language. Gratz's spontaneous outbursts, in which she called Bryant a "big phoney," "a little twerp" and a "liar" took place while she was engaged in protected grievance activity and were provoked by an unlawful disciplinary warning; therefore the judge concluded that they were not so egregious as to remove the protection of the Act. *Id.* at 817-819.

The Board rejected petitioner's contention that the unfair labor practice complaint should have been dismissed in

light of the arbitrator's ruling that Gratz had been discharged for good cause. The Board concluded that this case was not one in which it would be appropriate for the Board to exercise its discretion to defer to an arbitration award under *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955), because such deferral "would engender a result repugnant to the purposes and policies of the Act" (Pet. App. A-2). The Board noted that the arbitrator had not passed on the unfair labor practice allegations related to the suspension and discharge and had not specifically considered other unfair labor practice charges (relating to petitioner's offer of economic benefits) that the administrative law judge had found to establish violations of the Act that were closely interwoven with Gratz's discharge (*ibid.*). The Board also noted that the arbitration hearing had occurred after the hearing before the administrative law judge and the arbitrator's decision issued after the law judge's decision (*id.* at A-2 to A-3).

2. The court of appeals enforced the Board's order (Pet. App. A-5 to A-17). Noting the Board's wide discretion on whether to defer to an arbitral award (*id.* at A-9), the court held that the Board's refusal to defer here comported with the standards in *Spielberg*. The court stated (*id.* at A-12 to A-13):

> On the basis of [its] findings and conclusions, the Board could reasonably conclude that [petitioner's] activities constituted a sufficiently flagrant interference with protected activities that the duty to prevent unfair labor practices outweighed the policy of encouraging arbitration by deferring. We therefore find no abuse of discretion in the Board's conclusion that deferral would engender a result repugnant to the Act.

On the merits, the court held that substantial evidence supported the Board's determination that petitioner violated Section 8(a)(1) by unlawfully offering economic benefits to Gratz to induce her to cease union activity and

that petitioner disciplined and discharged Gratz because of her diligence as a union advocate, in violation of Section 8(a)(1) and (3) (Pet. App. A-14 to A-16). Judge Pregerson dissented, contending that the case should be remanded to the Board for an explanation of why deferral to arbitration would be repugnant to the purposes of the Act (*id.* at A-17).

ARGUMENT

Petitioner contends (Pet. 4-30) that the court of appeals erred in upholding the Board's decision not to defer to arbitration in this case. This contention is without merit. Moreover, the court of appeals' decision rests on the particular circumstances of this case and does not warrant review by this Court.

1. The Board has exclusive authority to adjudicate and remedy unfair labor practices under Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a). See *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436-437 (1967). Although the Board may in its discretion elect to defer to arbitral processes, it is not compelled to do so when an unfair labor practice has been committed. See *NLRB* v. *Strong*, 393 U.S. 357, 360-362 (1969). When the Board does assert jurisdiction, its decisions concerning unfair labor practices take precedence over arbitral awards that enforce private contract rights. See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964).

Consistent with these principles, the Board has had a long-standing policy of deferring to an arbitral award where the arbitrator's decision is not repugnant to the purposes of the Act, the arbitration procedures are fair and regular and all parties have agreed to be bound by the award. *Spielberg Manufacturing Co., supra.* The Board applied that policy here and declined to defer to the arbitrator's decision because it would have been repugnant to the purposes of the

Act to do so.[2] This determination was fully supported by the findings of the administrative law judge adopted by the Board. Prior to the arbitrator's decision, the administrative law judge found that Gratz's spontaneous outbursts of temper—conduct that was ultimately deemed insubordinate and "just cause" for discharge under the contract by the arbitrator—did not exceed the bounds of protected activity under the Act. The judge further found that petitioner's complaint that Gratz was not spending enough time on production work was pretextual and that petitioner was actually motivated by a desire to get rid of Gratz as chief steward because of her aggressive manner in fulfilling her union responsibilities. Moreover, the arbitrator's decision did not mention at all a fact that the Board found to be an independent violation of Section 8(a)(1)—petitioner's offer to Gratz of economic benefits in exchange for her resignation as chief steward.[3] Thus, to defer to the arbitrator's decision here—that there was "just cause" under the contract for Gratz's discharge—would be to permit a discharge that the evidence before the Board showed to be a "flagrant interference with protected activities" (Pet. App. A-13). Accordingly, the court of appeals correctly concluded that the Board did not abuse its discretion in finding that deferral here would be repugnant to the purposes and policies of the Act.[4]

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[2]Thus, petitioner's contention (Pet. 24-30) that the Board has concluded that deferral to arbitration necessarily conflicts with the policies of the Act is without foundation.

[3]Contrary to petitioner's assertion (Pet. 20-21), the record does not indicate that evidence of this offer of economic benefits was withheld from the arbitrator.

[4]Petitioner's contention (Pet. 4-10) that the court of appeals should have remanded the case to the Board for further explanation is without merit. As the court of appeals found (Pet. App. A-12 to A-13), the Board's conclusion that deferral to arbitration here would be repugnant to the purposes of the Act clearly rests on its findings that Gratz was discharged as a result of activity in her capacity as chief steward that

2. Contrary to petitioner's contention (Pet. 21-24), the decision of the court of appeals does not conflict with the Third Circuit's decision in *NLRB* v. *Pincus Bros.-Maxwell*, 620 F. 2d 367 (1980). In *Pincus Bros.*, the arbitrator had before him and gave full consideration to exactly the same facts that were involved in the unfair labor practice complaint. In fact, the parties agreed to waive a decision by an administrative law judge and have the Board make its deferral decision on the basis of the factual determinations made by the arbitrator. 620 F. 2d at 371. Here, the Board's decision rested on factual findings by the administrative law judge that were not made by the arbitrator. Indeed, a subsequent decision, *NLRB* v. *General Warehouse Corp.*, No. 80-1472 (3d Cir. Mar. 10, 1981), which distinguished *Pincus Bros.* on the above ground (slip op. 11 n.20), makes it clear that the Third Circuit would have reached the same result in the instant case as did the court of appeals below. The Third Circuit in *General Warehouse* approved the Board's refusal to defer to arbitration where, as here, the arbitrator's decision on the contractual issue did not consider all the facts that were considered by the Board.[5]

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was protected by Section 7 of the Act, 29 U.S.C. 157, and that petitioner had committed other unfair labor practices. See Pet. App. A-2.

[5]Likewise without merit is petitioner's contention (Pet. 10-21) that the court of appeals erred because the Board failed to apply its decision in *Electronic Reproduction Service Corp.*, 213 N.L.R.B. 758 (1974). That decision states (*id.* at 762) that, absent unusual circumstances, it will be presumed that the arbitrator considered the statutory issue in discharge and discipline cases even though no specific reference is made to the statute in his decision. Whether or not the arbitrator considered whether Gratz's discharge constituted an unfair labor practice because it was discriminatorily motivated, it is clear that the arbitrator did not consider the crucial evidence concerning petitioner's offer of economic benefits to Gratz, which the Board found to be an independent violation of Section 8(a)(1). See Pet. App. A-12 n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

SANDRA K. WILLIAMS
Attorney
National Labor Relations Board

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